In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1159

MILTON W. LEWIS and LEE ROY SOHN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1969. A petition for rehearing was denied on February 14, 1969. The petition for a writ of certiorari was filed on March 15, 1969. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by the trial court's refusal to turn over to a co-defendant a transcript of his testimony before the grand jury.

2. Whether petitioners were denied their right to a speedy trial.

STATEMENT

In July 1965, an indictment was returned in the United States District Court for the Northern District of Illinois charging petitioners and Jerry Pace [1] with conspiring together and with two corporate co-conspirators and one Dominic Pace, not named as co-defendants, to submit false credit statements to the Veterans Administration. In addition, petitioners, Sohn and Lewis, were charged with related substantive offenses under 18 U.S.C. 289. In August 1966, a superseding indictment was returned which was identical to the 1965 indictment, except that it set forth that the conspiracy was in violation of 18 U.S.C. 371.[2] Following a jury trial, petitioners were convicted on each of the counts in which they had been charged. Both were given general sentences of one year in prison. The court of appeals affirmed Sohn's convictions; it reversed Lewis' conviction on two of

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[1] Pace was convicted but did not appeal.

[2] The original indictment did not specify the statute violated by the conspiracy.

the substantive counts, but affirmed his conviction on the conspiracy count and one substantive count (Pet. App. A).

1. Prior to trial, on November 4, 1966, petitioners moved to dismiss the indictment on the ground that they had been denied the right to a speedy trial by virtue of the period intervening between the return of the initial indictment and the return of the superseding indictment on which they presently stand convicted; their motions were denied by the trial court (App. 1, 12).[3] The trial court also denied Pace's motions to inspect the minutes of his grand jury testimony, pursuant to Rule 16(a)(3), F.R. Crim. P., which were made prior to trial and at the outset of trial (App. 1, 15; Pet. App. A at 8).

2. The government's evidence established that, in May or June of 1962, petitioners Lewis and Sohn, who were the operators of Milroy Realty Company (a sales and property management broker licensed by the Veterans Administration), visited the offices of Hill's Reports Inc., a credit checking bureau. They spoke with one of the employees of the company in an effort to expedite the forwarding of credit reports on Milroy's customers who sought to purchase VA housing. At that time, petitioner Sohn advised Hill's that it would not have to check the credit information which Milroy sent, since he would personally vouch for the veracity of the information submitted. All that Hill's would have to do would be to type up

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[3] App. denotes the appendix of the appellant in the court below a copy of which has been certified to the Clerk of this Court.

the credit information received from petitioners, check its own files to determine whether any judgments against the individual were outstanding, and then submit its credit report to the VA. Thus, contrary to Hill's usual policy, the credit information submitted by petitioners was not checked for accuracy. This procedure was adopted by Hill's on the basis of petitioners' assurance that the procedure had been approved by the VA (App. 27-30, 36, 40, 127, 178).

Thereafter, petitioners and Pace caused numerous "Credit Statements and Offers of Prospective Purchasers" to be presented to the VA on behalf of their clients. These statements—which were customarily signed in blank by the clients—contained an inflated valuation of the clients' assets and/or an understatement of liabilities. Each of the clients testified that they had given petitioners or Pace accurate information but that the actual information contained on the forms submitted to the VA differed from that which they had supplied (App. 43-47, 57-61, 63-65, 75-76, 77-79, 90-98, 104-108, 117-119, 130-133, 144-148, 153-159).

The VA placed great reliance upon the credit information contained in the "Credit Statement and Offer of Prospective Purchaser" and depended upon full disclosure of an individual's assets and liabilities in determining whether to approve an application (App. 266, 269, 271-272).

ARGUMENT

1. Petitioners contend that they were prejudiced by the trial court's denial of co-defendant Pace's mo-

tion for the inspection of his grand jury minutes.[4] The court below correctly rejected as "speculative" petitioners' contention that, had Pace been permitted to refresh his recollection from the grand jury testimony, he would have testified and that the testimony would have been beneficial to their defense. (Pet. App. A at 8-9). There is nothing in the record to support the bald allegation, that Pace would have testified or that the testimony would have aided petitioners.

2. The court of appeals properly held that petitioners were not denied a speedy trial (Pet. App. A at 12). The offenses with which petitioners were charged were committed in 1962 and 1963. The record reveals the investigation of petitioners' activities continued at least into the early part of 1965 (App. 102). The evidence was presented to the grand jury in July of that year. After an indictment was returned—identical in all substantive respects to the August 1966 indictment which underlies this proceeding—petition-

[4] Although the record does not reveal the nature of the government's concession with respect to petitioners' standing to complain of the denial of Pace's motions to inspect his grand jury testimony, made pursuant to Rule 16(a)(3), F.R. Crim. P., a concession which the court below relied upon (Pet. App. A at 8), we do not believe that petitioners have any standing to complain of those denials as they possessed no interest whatsoever in the grand jury testimony of Pace. Cf. *Alderman* v. *United States*, No. 133, October Term, 1967, decided March 10, 1969, Slip op. at 5-10. Moreover, even under the liberalized Rule 16, there is no automatic right, as petitioners seem to suggest, that a defendant's own grand jury minutes be turned over to him merely upon request. *Walsh* v. *United States*, 371 F. 2d 436 (C.A. 1); *United States* v. *Roberts*, 264 F. Supp. 622 (S.D.N.Y.).

ers appeared and posted bond (Pet. at 14). Approximately thirteen months later, the superseding indictment was returned, and petitioners were tried five months thereafter.

As the court below pointed out, the five month delay between the return of the 1966 indictment and trial, some of which was the result of pre-trial motions filed by petitioners, was "quite a short period in a busy metropolitan court" (Pet. App. A at 12).

Nor did the delay occurring between the commission of the offenses and the return of the second indictment, deprive petitioners of Sixth Amendment rights. It is well established, that the normal safeguard against unreasonable pre-indictment delay is the relevant statute of limitations. See *United States* v. *Ewell*, 383 U.S. 116, 122; *Harlow* v. *United States*, 301 F.2d 361, 366 (C.A. 5), certiorari denied, 371 U.S. 814; *Foley* v. *United States*, 290 F.2d 562, 565 (C.A. 8), certiorari denied, 368 U.S. 888; *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (C.A. 6). Some jurisdictions have departed from this rigid rule, but only on a clear demonstration of prejudice flowing from the delay or a showing that the delay was purposely and oppressively caused by the government. See *e.g.*, *United States* v. *Feinberg*, 383 F. 2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044; *United States* v. *Deloney*, 389 F. 2d 324 (C.A. 7) (which partially overruled prior holdings in *United States* v. *Evans*, 385 F. 2d 824 (C.A. 7), and *United States* v. *Panczko*, 367 F. 2d 737 (C.A. 7)); *Ross* v. *United States*, 349 F. 2d 210 (C.A.D.C.); *Woody* v. *United States*, 370 F. 2d 214 (C.A.D.C.); *United States* v.

Harbin, 377 F. 2d 78, 79-80 (C.A. 4). No such showing has been made here.

As noted above, the allegation that Pace was unable to remember events because of the delay is purely speculative. With respect to petitioners' own professed inability to recall the events which supported their convictions, it is noteworthy that, despite the passage of thirteen months between the return of the first indictment and the return of the second indictment, no motion to dismiss the 1965 indictment, pursuant to Rule 48(b), F. R. Crim. P., was presented to the trial court, nor was any other action taken on petitioners' behalf in an effort to expedite the setting of a trial date. Since petitioners were fully apprised of the nature of the charges against which they would have to defend by the first indictment in 1965, there is no basis for their claim that they were prejudiced by the delay after that date. See *United States* v. *Ewell*, 383 U.S. 116, 120-121; *United States* v. *Perez*, 398 F.2d 658, 661 (C.A. 7); *United States* v. *Maxwell*, 383 F.2d 437, 441 (C.A. 2), certiorari denied, 389 U.S. 1057.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
J. THOMAS CARROLL, JR.,
Attorneys.

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